

1 KAREN A. OVERSTREET
2 Chief Bankruptcy Judge
United States Courthouse
3 700 Stewart St., Suite 6310
Seattle, WA 98101
206-370-5330
4

5
6 IN THE BANKRUPTCY COURT OF THE UNITED STATES FOR
THE WESTERN DISTRICT OF WASHINGTON
7 AT SEATTLE

8 In re) Chapter 7
9)
MICHAEL A. KERR and DAWNA L.)
KERR,) Case No. 06-12302
10)
Debtors.)
11)
-----)

12 In re) Chapter 7
13)
STEPHANIE M. KALLBERG,) Case No. 06-12881
14)
15) **MEMORANDUM DECISION**
Debtor.) **APPLYING SECTION 707(b)**
) **TO CASES CONVERTED FROM**
) **Chapter 13 TO Chapter 7**
-----)

17 These two matters came before the Court for hearing on
18 June 1, 2007. Both cases involve the same legal issue and are
19 addressed together in this opinion. In both cases the debtors
20 initially filed voluntary petitions under Chapter 13 and
21 subsequently converted to Chapter 7. After conversion, the
22 Bankruptcy Court Clerk's office generated orders to show cause
23 for dismissal due to the debtors' failure to file a new means
24 test Form B22A post conversion as required by Local Interim

25
26 Memorandum Decision - 1

1 Bankruptcy Rule ("LIBR") 1007-1(b).¹

2 In their responses, the debtors challenged LIBR 1007-1(b)
3 and denied that they were required to file Form B22A in a
4 converted case. The Court requested the United States Trustee
5 ("UST") to file a responsive brief in each of the cases. Because
6 this is a matter of first impression in this district, the Court
7 took the matter under advisement. Upon further review of the
8 pleadings and record herein the Court issues this Memorandum
9 Decision.

10 **I. FACTUAL BACKGROUND**

11 Ms. Kallberg filed a Chapter 13 petition on August 25, 2006.
12 At the same time, she filed a Statement of Current Monthly Income
13 and Calculation of Commitment Period and Disposable Income (Form
14 B22C) which showed that she was an above-median income debtor for
15 purposes of Section 1325(b) with monthly disposable income of
16 \$218.08 (Line 50, Form B22C). Her Chapter 13 plan proposed
17 monthly payments of \$670 over 60 months. Ms. Kallberg is a real
18 estate agent working on commission. She was not able to confirm
19 a Chapter 13 plan or pay her monthly plan payments. On February
20 5, 2007, she filed a motion to convert her case to Chapter 7, and
21 the order of conversion was signed on March 22, 2007. There is
22

23 ¹ Unless otherwise indicated, all Code, Chapter,
24 Section and Rule references are to the Bankruptcy Code, 11 U.S.C.
25 §§101 *et seq.* and to the Federal Rules of Bankruptcy Procedure
[**Interim**], Rules 1001 *et seq.*

1 no dispute that Ms. Kallberg's debts are primarily consumer
2 debts.

3 Mr. and Ms. Kerr filed a Chapter 13 petition on July 17,
4 2006. The Kerr's Statement of Current Monthly Income and
5 Calculation of Commitment Period and Disposable Income (Form
6 B22C) reported that they were above-median income debtors with
7 monthly disposable income of \$5,977.06 (Line 58, Form B22C).
8 The Kerrs confirmed a Chapter 13 plan on November 20, 2006,
9 requiring plan payments of \$5,500 per month. They subsequently
10 experienced economic problems, however, and were unable to
11 continue their plan payments. Their case was converted to
12 Chapter 7 on March 27, 2007. It is undisputed that the Kerrs'
13 debts are primarily consumer debts.

14 **II. ISSUES**

15 There are three issues before the Court: (1) Whether the
16 presumption of abuse under Section 707(b)(1) applies in a case
17 converted from Chapter 13 to Chapter 7; and if so (2) whether
18 Form B22A (Chapter 7 means test form) must be filed after
19 conversion to Chapter 7 pursuant to Section 521(a)(1)(B)(ii),
20 Interim Rule 1007(b)(4), and LIBR 1007-1(b); and if so
21 (3) whether the amounts for income and expenses required to be
22 inserted in Form B22A should be determined by reference to the
23 original petition date or the date of conversion.

24

25

26 Memorandum Decision - 3

III. JURISDICTION

This Court has jurisdiction over the pending matters, and these are core proceedings. 28 U.S.C. §§ 1334, 1408; 28 U.S.C. §157(b)(2)(A).

IV. ANALYSIS

6 These cases were filed after the effective date of The
7 Bankruptcy Abuse Prevention and Consumer Protection Act of 2005
8 ("BAPCPA") and are therefore subject to the "means test"
9 provisions of the statute. Under BAPCPA, Chapter 7 debtors with
10 primarily consumer debts are required to complete and file a
11 statement of current monthly income, also referred to as the
12 "means test" form. 11 U.S.C. §521(a)(1)(B)(v). If the
13 calculations in the means test form show that 1) the debtor's
14 monthly disposable income is at least \$166.67 per month, or
15 2) the debtor's monthly disposable income is at least \$100 and
16 would be sufficient to pay at least 25% of the non-priority
17 unsecured claims in the case, then pursuant to Section 707(b)(2),
18 the debtor's bankruptcy filing is presumed to be an abuse of the
19 bankruptcy system and is subject to dismissal on motion of the
20 UST or any party in interest. 11 U.S.C. §707(b)(1). To avoid
21 dismissal, a debtor unable to rebut the presumption of abuse may
22 consent to conversion to Chapter 13. As one commentator has
23 stated.

BAPCPA eliminates the old §707(b) presumption in favor of the debtor's choice of Chapter 7, and replaces it with a new presumption, generated by

the means test, that Chapter 7 relief is an "abuse" in cases where the debtor appears to have sufficient debt-paying ability.

Eugene R. Wedoff, *Means Testing in the New §707(b)*, 79 Am. Bankr. L. J. 231, 234 (Spring, 2005).

5 The debtors in these cases do not dispute that had they
6 filed their cases initially under Chapter 7, their cases would
7 have been presumed abusive because their monthly disposable
8 income exceeds the threshold described above. Because they have
9 already tried and failed in their Chapter 13 cases, however, they
10 argue that the presumption of abuse under Section 707(b) should
11 not apply to them.

A. Statutory Analysis of Section 707(b).

13 The debtors' argument that Section 707(b) is inapplicable to
14 converted cases depends upon their interpretation of the
15 following language: "[T]he court...may dismiss a case **filed** by an
16 individual debtor **under this chapter**...if it finds that the
17 granting of relief would be an abuse of the provisions of this
18 chapter. " 11 U.S.C. § 707(b)(1)(emphasis added). They interpret
19 "filed under this chapter" to refer only to cases that are
20 initially filed under Chapter 7. Because their cases were
21 initially filed under Chapter 13, they contend that Section
22 707(b) is not applicable. The UST argues that the phrase "under
23 this chapter" modifies the word "case," such that the plain
24 meaning of the statute is to apply Section 707(b) to all "case[s]
25 ... under this chapter" involving debtors who owe primarily

1 consumer debts.

2 There are only two reported cases addressing the issues
3 before the Court. The first case, *In re Perfetto*, 361 B.R. 27
4 (Bankr. D. R.I. 2007), rejected the debtors' narrow reading of
5 Section 707(b) and held that a debtor whose case is converted
6 from Chapter 13 to Chapter 7 is subject to the means test and is
7 required to file Form B22A after conversion of the case. The
8 facts in that case, however, were strong motivation for the
9 court's decision; the debtor converted her case to Chapter 7 just
10 two weeks after she filed the Chapter 13 petition, without any
11 evidence of a change in her financial circumstances.

12 Understandably, the court was sympathetic to the UST's argument
13 that "the Debtor's interpretation, if accepted, would create a
14 procedural charade wherein debtors could evade the means test by
15 filing a Chapter 13 petition, then immediately converting the
16 case to Chapter 7, and avoiding scrutiny under Section 707(b)."
17 *Id.* at 30.

18 In the second case to address the issues, *In re Fox*, ___B.R.
19 ___, 2007 WL 1576140 (Bankr. D. N.J., June 1, 2007), the facts
20 were more sympathetic to the debtor and the court reached the
21 opposite result from *Perfetto*. In *Fox*, the debtor converted her
22 case to Chapter 7 three months after filing a Chapter 13 because
23 she was laid off from her job. On these facts, the court held
24 that Congress, in enacting changes to Section 707(b), intended
25 only that the means test provisions be applied to cases

1 originally filed under Chapter 7.

2 This Court finds *Perfetto*'s construction of the applicable
3 statutes and rules more persuasive. The debtors' argument
4 construes Section 707(b) too narrowly, and even that narrow
5 construction does not support the sweeping conclusion that the
6 phrase "filed by an individual under this chapter" insulates
7 debtors in converted cases from scrutiny for filing abuse.

8 Prior to BAPCPA, Section 707(b) was applied without question
9 in cases converted from Chapter 13 to Chapter 7. *See, e.g., In*
10 *re Morris*, 153 B.R. 559, 563-65 (Bankr. D. Or. 1993) (case
11 converted from Chapter 13 to Chapter 7 dismissed under Section
12 707(b)); *In re Traub*, 140 B.R. 286, 291 (Bankr. D. N.M.
13 1992) (dismissal under Section 707(b) of a case converted from
14 Chapter 11 to Chapter 7). Despite the major amendments to
15 Section 707(b) under BAPCPA, the phrase at issue here was not
16 changed.

17 Webster's Dictionary defines "filed" as "to put or keep
18 (e.g., papers) in useful order" or "to enter (e.g., a legal
19 document) on public official record." *Webster's II New Riverside*
20 *University Dictionary* 477 (1988). Here, in the simplest sense,
21 the debtors' cases were entered on the Court's docket under
22 Chapter 13 by the filing of petitions in bankruptcy. The cases
23 are now entered on the Court's docket under Chapter 7 as a result
24 of the debtors' filing motions for conversion. While the cases
25 were initially *filed* under Chapter 13, they are now *filed* under
26 Memorandum Decision - 7

1 Chapter 7. If Congress meant to limit the application of the
2 means test to debtors who initially or originally filed a
3 petition under Chapter 7, that would have been simple to
4 articulate.

5 Reading Section 707(b) in conjunction with other Code
6 sections further persuades the Court that the debtors in these
7 cases are subject to Section 707(b). Section 348(a) provides:

8 Conversion of a case from a case under one chapter
9 of this title to a case under another chapter of
this title constitutes an order for relief under
the chapter to which the case is converted, but,
..., does not effect a change in the date of the
filing of the petition, the commencement of the
case, or the order for relief.

12 In *Perfetto*, the court cited a number of cases for what it
13 described as the proposition that debtors are deemed to have
14 "filed under" the converted chapter as of the date of the filing
15 of the original petition. *In re Perfetto*, 361 B.R. 27, 30
16 (Bankr. D. R.I. 2007), citing *In re Sours*, 350 B.R. 261, 268
17 (Bankr. E.D. Va. 2006); *In re Capers*, 347 B.R. 169, 170 (Bankr.
18 D. S.C. 2006); *In re Lyons*, 162 B.R. 242, 243 (Bankr. E.D. Mo.
19 1993). The court in *Fox* commented that these cases do not
20 directly support that proposition and concluded that Section 348
21 provides for the contrary. *Fox*, *supra*, at 7, fn 4 ("[Section]
22 348(a) specifically provides for the contrary and only provides
23 an exception for certain sections of the Code, but does not
24 specifically provide for an exception for § 707(b)." As this
25 Court reads Section 348, however, the clear intent of the section

1 is to retain the original filing date as the date of the "filing
2 of the petition", "commencement of the case" or "order for
3 relief" except in the circumstances provided for in subsections
4 (b) and (c), where these terms are instead deemed to refer to the
5 conversion date. Because Section 707(b) is not mentioned in
6 either subsection (b) or (c) of Section 348, it follows that the
7 original filing date is retained upon conversion, but the case is
8 otherwise treated as if the debtor had originally filed under the
9 converted chapter.

10 This conclusion is consistent with other applicable
11 statutes, rules and the Local Interim Bankruptcy Rules. Section
12 521(a)(1)(B)(ii) requires all debtors to file a schedule of
13 current income and current expenditures unless the court orders
14 otherwise. Rule 1007(b)(4) states that unless Section
15 707(b)(2)(D) applies (it does not in these cases), a "debtor in a
16 chapter 7 with primarily consumer debts *shall* file a statement of
17 current monthly income prepared as prescribed by the appropriate
18 Official Form . . ." (emphasis added). Each of the debtors in
19 the instant cases is now "in a chapter 7" and therefore subject
20 to the requirements of Rule 1007(b)(4). Because the appropriate
21 Official Form for a Chapter 7 is B22A, LIBR 1007-1(b) requires
22 the debtors to file the Chapter 7 Official Form B22A upon

23

24

25

26 Memorandum Decision - 9

1 conversion.² Rule 1019(2) provides for a new time period for
2 filing a motion under Section 707(b) pursuant to Rule 1017. Rule
3 1017, in turn, provides that a motion under Section 707(b) must
4 be filed within 60 days after the first date set for the meeting
5 of creditors. Thus, after conversion, a motion under Section
6 707(b) would have to be filed within 60 days after the Chapter 7
7 Section 341 meeting.

8 Section 342(d) requires the Clerk to give notice to
9 creditors "within 10 days after the date of the filing of the
10 petition" if the presumption of abuse has arisen in a case.
11 Section 348(c) states that Section 342 applies in a converted
12 case "as if the conversion order were the order for relief."
13 That language is effective to require the setting of a new
14 Section 341 meeting under Section 342(a), which is based upon the
15 "order for relief", but it provides no direction as to how the
16 Clerk should comply with its duty to provide notice based upon
17 the "date of the petition" in a converted case. The court in *Fox*
18 regarded this inconsistency in the language as further proof that
19 Congress did not intend to apply the presumption of abuse to
20 converted cases. This Court is inclined to conclude that the
21 inconsistency in the language in Section 342(d) is merely sloppy

22
23 ² LIBR 1007-1(b) states that when a Chapter 7 case is converted
24 to another Chapter, the debtor is required to file "amended
25 schedules, statements, and documents required by Rule
1007(b)(1),(4),(5), and (6), Interim Fed. R. Bankr. P...."

1 drafting; had the reference in that section been to "order for
2 relief" instead of to the petition date, there would be no
3 confusion.³

4 For the foregoing reasons, the Court holds that
5 Section 707(b) applies in cases converted from Chapter 13 to
6 Chapter 7 and that each debtor in these cases is therefore
7 required to file a Form B22A. This conclusion requires the Court
8 to examine what information regarding income and expenses should
9 be included in the form.

10 **B. Income and Expenses.**

11 Section 707(b)(2)(C) requires the debtor to state, in the
12 schedule of current income required under Section 521, his or her
13 "current monthly income." This is the same language that appears
14 in Section 707(b)(2)(A)(i), where the presumption of abuse is
15 described. Current monthly income is expressly defined in
16 Section 101(10A) as the debtor's average monthly income received
17 in the six-month period preceding "the date of the commencement
18 of the case." This definition is repeated in Form B22A, Part II,
19 and in Form B22C, Part I, Line 1. The date of the "commencement
20 of the case" does not change when the case is converted. Section

21
22 ³ In a converted case where the debtor has not filed Form B22A
23 by the time the Section 341 meeting notice is issued, the Clerk
24 may indicate that there is insufficient information to determine
25 if there is a presumption of abuse. Following the filing of Form
B22A, if the debtor has checked the box indicating that the
presumption arises, the Clerk can send out notice to creditors of
the existence of the presumption just as it does at the outset of
cases filed originally under Chapter 7.

1 348(a). Consequently, it is clear that "current monthly income"
2 in a converted case is determined based on the initial filing
3 date, admittedly, a date that could be years prior to the
4 conversion date.

5 Similarly, the means test analysis looks at the debtor's
6 expenses, which are referred to as "deductions" in Form B22A.
7 There are three categories of expenses: necessary expenses
8 defined by the Internal Revenue Service, necessary expenses
9 defined by statute, and allowances for debt payment. *Wedoff*, at
10 252. *See, also*, Section 707(b)(2)(A)(ii)-(iv). Neither the Code
11 nor the Rules define the terms "current expenditures" as used in
12 Section 521(a)(1)(B)(2) or "monthly expenses" as used in Section
13 707(b)(2)(A). Section 707(b)(2)(A)(ii)(I), however, refers to
14 "Other Necessary Expenses issued by the Internal Revenue Service
15 ... as in effect on the date of the order for relief." (emphasis
16 added). Because Section 348(a) retains the original date of the
17 order for relief notwithstanding subsequent conversion of the
18 case, the Court holds that the debtors should include in Form
19 B22A their expenses as of the original petition date. The
20 alternative, to compare income from the six months prior to
21 Chapter 13 filing to expenses as of the conversion date, makes no
22 sense. The debtors correctly point out that this comparison
23 would almost always give rise to a presumption of abuse where the
24 conversion was the result of a post-filing loss of income or
25 increase in expenses.

26 Memorandum Decision - 12

1 The debtors argue that using income and expense figures that
2 predate the initial filing is misleading and does not present an
3 accurate picture of their finances post-conversion. Whether the
4 completed Form B22A would be misleading, however, would depend
5 upon the time between the original filing of the case and the
6 conversion date and any change of circumstances during that
7 period of time. For example, in the case of the debtor in
8 *Perfetto*, where the conversion occurred two weeks after the
9 Chapter 13 case was filed, the information in Form B22A would be
10 quite relevant and accurate. In the *Fox* case, where the debtor
11 became unemployed after the petition was filed, Form B22A would
12 not provide accurate information on the question of abuse.
13 Instead, in the *Fox* case, the UST and creditors would obtain more
14 accurate information from the debtor's post-conversion amended
15 schedules I and J which, presumably, would demonstrate the lack
16 of income to support expenses.

17 **C. Form Over Substance.**

18 The debtors argue that even if the presumption of abuse may
19 be applied to them, they should not be required to file Form B22A
20 because it merely repeats the information contained in Form B22C.
21 While that may be the case for these debtors, there are
22 substantive differences between Forms B22A and B22C that may
23 impact other debtors and change whether the presumption arises.

24 For example, joint debtors may complete a single Form B22C,
25 but each joint debtor must complete a separate Form B22A; spousal
26 Memorandum Decision - 13

1 income is treated differently in Form B22A and B22C; disabled
2 veterans are permitted an exclusion in Form B22A, but not in Form
3 B22C; Chapter 13 debtors may deduct administrative costs of the
4 Chapter 13 case in Form B22C, Part IV, Line 33, but may not in
5 Form B22A, Part V (see Line 28); and a debtor whose income is
6 equal to the median income is treated differently for purposes of
7 Section 1325(b)(4) in Form B22C, Part II, Line 17 (debtor with
8 income equal to median must propose five-year plan) than a debtor
9 with the same income for purposes of Section 707(b)(7) in Form
10 B22A, Part III, Line 15 (presumption of abuse does not apply to
11 debtor whose income is equal to the median income). These
12 illustrations highlight only some of the differences between the
13 two forms. Rather than second guess the Bankruptcy Rules
14 Committee responsible for designing Forms B22A and B22C, the
15 Court concludes that the use of the forms for their intended
16 purpose should be respected.

17 **D. Motions to Dismiss under 707(b).**

18 The debtors contend that the Court's decision will subject
19 them to harassment by creditors who will bring motions under
20 Section 707(b), relying on a presumption of abuse based upon
21 outdated income or expense information. It is true that in
22 revising Section 707(b) under BAPCPA, Congress expanded standing
23 to bring a motion to dismiss under 707(b) to include any party in
24 interest. The presumption of abuse, however, is just that - a
25 presumption, and no more. The debtor has a right to rebut the
26 Memorandum Decision - 14

1 presumption with a showing of changed financial circumstances
2 between the filing and conversion dates (See Section
3 707(b)(2)(B)). Parties in interest, before bringing motions to
4 dismiss based solely on the presumption afforded in Section
5 707(b)(2), would be well advised to compare the debtor's post-
6 conversion Form B22A with post-conversion amended schedules I and
7 J to determine if the debtor's filing really is abusive.

8 This Court's decision probably will create additional
9 proceedings that could be avoided under the holding in *Fox*.
10 There is no requirement, however, that the process of conversion
11 be free from hurdles. To be sure, BAPCPA was not designed to
12 improve judicial efficiency. Rather, the intent was to prevent
13 abuse of the relief available under the Bankruptcy Code. A
14 debtor who files bankruptcy in good faith under Chapter 13, then
15 subsequently suffers a financial setback that forces conversion
16 to Chapter 7, should have no difficulty rebutting the presumption
17 of abuse if the debtor's circumstances have legitimately
18 worsened. On the other hand, a debtor who converts a case under
19 circumstances similar to the debtor in the *Perfetto* case should
20 be subjected to the same scrutiny for abuse as would any other
21 debtor filing initially under Chapter 7.

22
23
24
25
26 Memorandum Decision - 15

CONCLUSION

For the foregoing reasons, the Court finds that each of the debtors is required to file Form B22A pursuant to Rule 1007(b)(4) and LIBR 1007-1(b).

DATED this 18th day of July, 2007.

Karen A. Overstreet
KAREN A. OVERSTREET
United States Bankruptcy Judge